

NO. 41960-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH PARK,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge

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REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
THE EVIDENCE IS INSUFFICIENT TO PROVE THE ELEMENT OF PREMEDITATION FOR FIRST-DEGREE MURDER .....	1
B. <u>CONCLUSION</u> .....	8

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

#### State v. Commodore

38 Wn. App. 244, 684 P.2d 1364 (1984)  
rev. denied, 103 Wn.2d 1005 (1984) ..... 3, 6, 7

#### State v. Ortiz

119 Wn.2d 294, 831 P.2d 1060 (1992) ..... 1, 2

#### State v. Pirtle

127 Wn.2d 628, 904 P.2d 245 (1995)  
cert. denied, 518 U.S. 1026 (1996) ..... 1, 2, 3

#### State v. Rehak

67 Wn. App. 157, 834 P.2d 651 (1992)  
rev. denied, 120 Wn.2d 1022 (1993)  
cert. denied, 508 U.S. 953 (1993) ..... 3, 5, 6

#### State v. Sherrill

145 Wn. App. 473, 186 P.3d 1157 (2008)  
rev. denied, 165 Wn.2d 1022 (2009) ..... 3, 4, 5, 6

A. ARGUMENT IN REPLY

THE EVIDENCE IS INSUFFICIENT TO PROVE THE  
ELEMENT OF PREMEDITATION FOR FIRST-DEGREE  
MURDER

In determining whether there is sufficient evidence of premeditation, courts look to evidence of four factors: (1) motive, (2) procurement of a weapon, (3) stealth, and (4) method of killing. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (citing State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)), cert. denied, 518 U.S. 1026 (1996). The second and third factors are evidence of planning. Id. Park argues the evidence at trial was insufficient to prove premeditation because there is no evidence of prior threats, planning, or a prolonged method of killing requiring deliberation. Brief of Appellant (BOA) at 7-13.

Though not disputing the above factors are “particularly relevant,” the State suggests they are “non-exclusive,” and the existence of each is not required to prove premeditation. Brief of Respondent (BOR) at 30. The State also cites prior threats, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene, as examples of relevant facts demonstrating premeditation. BOR at 31.

Park does not dispute the relevance of the State's examples. Indeed, as discussed in Park's opening brief, courts applying Pirtle's factors have considered similar facts as proof that a particular factor was satisfied. BOA at 11-13. Rather, Park argues that each Pirtle factor must be examined before "sufficient evidence of premeditation" can be found.

The Pirtle Court cited Ortiz when setting forth the factors. Neither Court's analysis stopped after finding the presence of one factor, or even two or three. Instead, both cases examined all four factors to determine if the evidence was "substantial." Pirtle, 127 Wn.2d at 644-46; Ortiz, 119 Wn.2d at 312-13. Thus, Pirtle and Ortiz demonstrate the combination of factors, and facts supporting each, are what constitute "substantial evidence."

In any event, the State's examples do not demonstrate premeditation in this case. The State does not dispute Park had never threatened Joseph Gamar. There is no evidence the knife taken from Park's kitchen to his bedroom was readily accessible or a "planned presence." Police found several other knives in Park's house, one of which was closer to Park's bedroom. The same knife could have caused all of Gamar's wounds. Finally, Gamar was not attacked from behind and did not have defensive wounds. BOA at 9-13.

The State nonetheless cites State v. Sherrill,<sup>1</sup> State v. Rehak,<sup>2</sup> and State v. Commodore<sup>3</sup> for the proposition that each Pirtle factor is not required for a finding of premeditation. BOR at 31-37. Rehak and Commodore predated the Supreme Court's decision in Pirtle. Moreover, each case is factually distinguishable.

Sherrill was charged with first-degree murder for the death of his girlfriend, Hilton. The couple lived together for three years and "had a history of domestic violence" during the latter part of their relationship. Hilton was found lying on the floor in the back of their trailer home. Her dentures were broken and her face was black and blue. Sherrill was upset, crying, and covered with blood. His right hand was swollen and stained with Hilton's blood. Sherrill, 145 Wn. App. at 474-76.

Sherrill told police she and Hilton had been drinking and fighting before Hilton "spaced out" and quit breathing. Sherrill later told police Hilton fell and hit her head on a table. He stated his blood was on her as a result of CPR. Sherrill, 145 Wn. App. at 476.

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<sup>1</sup> 145 Wn. App. 473, 186 P.3d 1157 (2008), rev. denied, 165 Wn.2d 1022 (2009).

<sup>2</sup> 67 Wn. App. 157, 834 P.2d 651 (1992), rev. denied, 120 Wn.2d 1022 (1993), cert. denied, 508 U.S. 953 (1993).

<sup>3</sup> 38 Wn. App. 244, 684 P.2d 1364 (1984), rev. denied, 103 Wn.2d 1005 (1984).

Blood spatter was found “in several distinct locations around the trailer, including the kitchen, bathroom, living room, on appliances, on the carpet, and high and low on the walls.” Blood spatter was also found on the trailer’s wheels. The pattern of blood spatter was not consistent with a fall. Clumps of hair were inside and outside the trailer. Blood and imbedded hair were on the VCR, the television receiver, and a step outside the trailer. Sherrill, 145 Wn. App. at 476-77.

An autopsy revealed “at least 42 separate blunt impact injuries.” Hilton suffered internal injuries to her brain and abdominal areas, several fractured ribs, a lacerated liver, and “significant” internal bleeding in her chest. The cause of death was multiple internal injuries due to blunt impact to the head, chest and abdomen. Sherrill, 145 Wn. App. at 477.

The Court of Appeals noted the lack of “evidence of motive, procurement of a weapon, or stealth.” Sherrill, 145 Wn. App. at 485. The cause of death was, however, a “significant factor.” The Court noted “there were multiple attacks over several hours” inside and outside the trailer. The Court also cited the lengthy history of violence during the relationship. Finally, Hilton had defensive wounds. The Court concluded this evidence, “taken together” was sufficient to find premeditation. Sherrill, 145 Wn. App. at 485-87.

Like Sherrill, Park argues there was a lack of evidence demonstrating stealth or a plan to kill Gamar. BOA at 9-10. Gamar, unlike Hilton, had no defensive wounds. Nor did Park and Gamar have a history of violence against each other. Moreover, contrary to the “multiple attacks over several hours” found in Sherrill, the incident in Park's case lasted but a few minutes, after which Gamar fled. BOA at 2-7.

In Rehak, police responded to Rehak's house after she called 911 and reported her husband had been shot. Mr. Rehak was shot three times in the head as he sat in the basement. The first two shots were fatal. Rehak denied she was the shooter. Rehak, 67 Wn. App. at 159.

At the time of the shooting, the Rehaks had overdue bills, including one for their home mortgage. Rehak hid mail and bills from her husband. Mr. Rehak expressed surprise at the mortgage delinquency when informed by the mortgage company. The Rehaks' bank account balances had decreased significantly during the preceding two years. Rehak, 67 Wn. App. at 160.

At trial, the Rehaks' children testified the marriage was “stormy and occasionally abusive[.]” Rehak claimed she “didn't know if she could take it [fighting] anymore.” Rehak, 67 Wn. App. at 160.

The Court of Appeals found the circumstantial evidence sufficient to find premeditation. The Court concluded:



It was reasonable for the jury to infer from the evidence that the killer prepared the gun; crept up behind the victim who was sitting quietly in his chair and not in a confrontational stance; and shot three separate times, twice after the victim had already fallen to the floor.

Rehak, 67 Wn. App. at 164.

As in Sherrill, the Rehak's had a history of fighting during the relationship. Financial issues were a motive for the murder. The shooter prepared the gun and continued to shoot even though the first two shots were fatal and Mr. Rehak had fallen to the floor.

Unlike Rehak, here there was no history of violence. Moreover, although a knife was taken from the kitchen to the bedroom, it was not physically manipulated or "prepared" to become a murder weapon. Finally, Park did not continue to attack Gemar after he left the house. BOA at 2-7.

Commodore is the third case cited by the State. Commodore began arguing with a guest about drugs during a party at his home. The argument began downstairs but continued onto the upstairs porch. When the argument subsided, Commodore went inside the house, closed the door, and stood by listening. After two minutes, Commodore left the door, returned to the porch with a gun, and shot the guest in the head. Commodore, 38 Wn. App. at 245.

The Court of Appeals found the evidence sufficient for premeditation. The Court concluded the arguments between Commodore and the guest indicated Commodore had a motive to kill. Commodore's lingering behind the door, proceeding to a room where he knew he would find a gun, and returning to shoot the guest suggested Commodore engaged in planning. Commodore, 38 Wn. App. at 248.

In contrast, there is no evidence Park proceeded to the kitchen after the argument with Gamar because "he knew he would find" a weapon. There were several knives in Park's house, one of which was closer to the bedroom. Park also did not attack Gamar in a manner indicating an intention to cause immediate death, such as Commodore's shooting the guest in the head. While Gamar sustained several stab wounds, only the knife wound in his left chest was fatal. No evidence shows when during the fight the fatal injury occurred. Gamar's injuries were not immediately incapacitating and possibly survivable had Gamar received rapid medical attention. BOA at 2-7.

For the aforesaid reasons, the State's reliance on the cited cases is misplaced and highlights the deficiencies of its proof to establish premeditation. Because the evidence of premeditation was insufficient to support the jury's verdict, this Court should reverse Park's conviction.

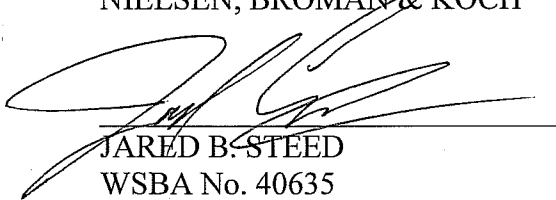
B. CONCLUSION

For the reasons discussed above and in the opening brief, Park's conviction for first-degree murder is not supported by the evidence. It must be vacated.

DATED this 2<sup>nd</sup> day of April, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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Attorneys for Appellant

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JEREMIAH PARK,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2<sup>ND</sup> DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEREMIAH PARK  
DOC NO. 836010  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 2<sup>ND</sup> DAY OF APRIL 2012.

x Patrick Mayovsky

# NIELSEN, BROMAN & KOCH, PLLC

**April 02, 2012 - 1:55 PM**

## Transmittal Letter

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